SUPREME COURT, U. S.

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In the

Supreme Court of the United States

WILLIAM KIRVIN BARLOW,

Appellant,

v.

STATE OF TEXAS,

Appellee.

On appeal from the Court of Criminal Appeals of Texas

JURISDICTIONAL STATEMENT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

JURISDICTIONAL STATEMENT

Appellant appeals from the Judgment of the Criminal District Court No. 4 of Dallas County, Texas and the Opinion of the Court of Criminal Appeals of Texas affirming said Judgment and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The Opinion of the Texas Court of Criminal Appeals, Austin, Texas, is reported in 398 S.W. 2d 933 (Tex. Cr. App., 1966), and a copy of said Opinion is attached hereto as Appendix A.

JURISDICTION

This appeal is taken pursuant to 28 U.S.C. 1257 (2) in that Article 802b, Vernon's Ann. P.C. is invalid and repugnant to the Constitution of the United States and the decision appealed from herein is in favor of its validity. Said Statute, as amended, is attached hereto as Appendix B. The Texas Court of Criminal Appeals delivered its decision on January 12, 1966, and Appellant's Motion for Rehearing was denied on March 2, 1966, at which time such Judgment became final. Notice of Appeal was filed in said Court on March 29, 1966.

QUESTION PRESENTED

The question presented is whether or not a Statute is unconstitutional which requires the State to read the allegations contained in the indictment, charging Appellant with a prior misdemeanor conviction to the jury before the jury has passed upon the issue of whether Appellant is guilty or innocent of the primary act charged in the indictment.

STATEMENT

Appellant was convicted in the Criminal District Court No. 4 of Dallas County, Texas of the offense of driving

while intoxicated, second offense, in violation of Article 802b, Vernon's Ann. P. C. Punishment was assessed at eight (8) months confinement in the Dallas County Jail. Appellant is presently at large on bail in the sum of Seven hundred fifty ($750.00) Dollars. When said cause was called for trial, Appellant, on April 12, 1965, and before the reading of the indictment to the jury, moved the Court to quash the indictment for the reason that the act of the legislature under which the indictment was drawn, i.e., Article 802b, supra, was unconstitutional since the same made reading the second paragraph of the indictment charging Appellant with the misdemeanor offense of driving while intoxicated necessary before the jury passed upon the innocence or guilt of Appellant for the primary offense charged.

In the alternative, Appellant moved the trial court to order the Prosecutor not to read the second count to the jury or to do anything from which the jury might learn of the matters set out therein until after the jury decided whether or not Appellant was guilty of the acts charged in the first count of the indictment. The Court, on April 12, 1965, overruled both said Motions and the second paragraph of said indictment charging Appellant with a prior misdemeanor was read to the jury. The Appellant also unsuccessfully urged the same grounds as the basis for his Motion for Instructed Verdict and for New Trial.

The same question as set out above was presented to the Texas Court of Criminal Appeals and in its opinion reported in 398 S.W. 2d 933, the Court said:

> "We also overrule the contention that permitting the state to read the allegations of the second paragraph of

the indictment, charging the prior misdemeanor conviction of driving while intoxicated before the jury had passed upon the issue of whether appellant committed the act charged in the first paragraph of the indictment, constituted a denial of due process guaranteed to appellant under the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

By the provisions of Art. 802b, supra, under which the indictment was drawn, the prior misdemeanor conviction is an element of the subsequent felony offense of drunken driving. Skaggs v. State, 160 Tex. Cr. R. 20, 266 S.W. 2d 871. To sustain a conviction for such felony offense, it was incumbent upon the state to plead and prove the prior misdemeanor conviction. Johnson v. State, 160 Tex. Cr. R. 290 S.W. 2d 393. To vest the district court with jurisdiction it was necessary for the indictment to allege the prior misdemeanor conviction. Hill v. State, 158 Tex. Cr. R. 313, 256 S.W. 2d 93.

We do not agree that Art. 802b, supra, is unconstitutional because it permits the state to plead and prove the prior misdemeanor conviction in making out its case before the jury of the subsequent felony offense of driving while intoxicated.

This Court has not followed the holding in Lane v. Warden, 4th Cir., 320 F. 2d 179, cited by appellant, but, on the contrary, has consistently rejected the claim that reading to the jury that portion of an indictment alleging a prior conviction for the purpose of enhancement of the penalty, before a determination of guilt of the primary offense, constitutes a denial of due process of law. Ex parte Gomez, Tex. Cr. App., 389 S.W. 2d 308; Stoneham v. State, Tex. Cir. App., 389 S.W. 2d 468. See also, Breen v. Beto, 5th Cir. 341 F. 2d 96.

The informal bills of exception appearing in the record have been examined and do not present reversible error.

The judgment is affirmed.

THE QUESTION IS SUBSTANTIAL

The issue involved in this Appeal is similar to the one raised by *Lane v. Warden, Maryland Penitentiary*, 320 F. 2d 179 (4th Cir., 1963). In the *Lane* case, the Defendant objected to the reading of that portion of the indictment to the jury which contained detail of two prior narcotic convictions in addition to the facts of the primary offense. The trial court overruled the objection and permitted the indictment to be read to the jury in its entirety. The Defendant contended before the United States Court of Appeals, Fourth Circuit that:

> "by informing the jury of the details of his two prior convictions at the beginning of the trial, the state deprived him of a fair hearing on the charges for which he was then on trial and thereby denied him due process of law guaranteed by the Fourteenth Amendment."

This is exactly the position urged by the Appellant in the instant case. The Court quoted with approval the following language:

> "It cannot be believed that an accused man would ever have a fair trial, resulting in a verdict not affected by prejudice or by considerations by which the jury should not be informed, if during that trial allegations that he had twice before been convicted of state prison crimes have been read to the jury, and the evidence of his former convictions has been placed before them * * *".

The Court then held:

> "We reach the conclusion that under the facts of this case, the reading to the jury, at the commencement of Lane's trial, of that portion of the indictment relating to his prior conviction destroyed the impartiality of the jury and denied him due process of law".

In the present case, that portion of the indictment charging Appellant Barlow with a prior misdemeanor conviction was read under objection to the jury and the same destroyed the impartiality of the jury. The record in this proceeding clearly reflects the prejudice and harm done to Appellant thereby. This is true since the jury, at the close of the testimony, found that Appellant had been convicted of the prior misdemeanor offense, even though the State wholly failed in its efforts to prove the prior conviction. It is also observed that the Texas Court of Criminal Appeals have held that evidence of a prior misdemeanor offense of driving while intoxicated is not even admissible for purposes of impeachment. *Burton v. State*, 194 S.W. 2d 398 (Tex. Cr. App., 1946).

It is therefore respectfully submitted that the question presented by this Appeal is substantial and that it is of public importance.

Respectfully submitted,

CERVIN & STANFORD

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PAUL H. STANFORD

CERTIFICATE

This is to certify that a copy of this Jurisdictional Statement was mailed, postage prepaid, this 18th day of April, A.D. 1966, to the Honorable Charles B. Swanner, Assistant Attorney General for the State of Texas, Austin, Texas; and, to the Honorable Leon Douglas, State's Attorney, Austin, Texas; and, to the Honorable Henry Wade, Criminal District Attorney, County Courthouse, Dallas, Texas.

Alto B. Cervin

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